

**United States Department of Labor
Employees' Compensation Appeals Board**

S.P., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Baton Rouge, LA, Employer**

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**Docket No. 17-0055
Issued: March 21, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 14, 2016 appellant filed a timely appeal from a May 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated February 9, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that the medical evidence of record proves the extent of her work-related injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on December 8, 2014 appellant, then a 47-year-old mail processing clerk, sustained a closed fracture of one or more phalanges of the right foot when a heavy package fell onto her foot while she was working in the priority mail section at work.

On December 3, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a December 21, 2015 letter, OWCP advised appellant of the type of evidence needed to establish her claim, to include an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*) and a physician's narrative opinion regarding the diagnosed conditions and degree of impairment with a detailed description of all objective findings and subjective complaints.

In a January 12, 2016 letter, Dr. Patrick B. Hall, a podiatrist, noted that he last saw appellant on August 10, 2015 and that she wore regular shoe gear. He further noted that she did not have any pain or complaints and that an x-ray showed healing and full consolidation of her fracture. Dr. Hall reported that appellant had no pain on examination and compression. Appellant informed Dr. Hall that she had no pain or limitations. Dr. Hall diagnosed fracture of the right great toe distal phalanx. He advised that appellant had no impairment. Dr. Hall related that she had fully healed and had no difficulties, limitation with range of motion, pain, or shoe or activity modifications.

By decision dated February 9, 2016, OWCP denied appellant's schedule award claim, finding that the medical evidence of record failed to demonstrate a measurable impairment.

OWCP received a February 18, 2016 report from Dr. Hall who noted appellant's complaint of persistent right foot pain. Dr. Hall also described findings on physical examination and assessed continued right foot pain following a healed fracture.

In a report dated March 3, 2016, Dr. Qui T. Le, a podiatrist, noted appellant's bilateral foot complaints and findings on physical and x-ray examination. He assessed right fascial fibromatosis, degenerative joint disease of the right ankle/foot, inflammation, difficulty walking, edema of the lower extremity, equinus gastrocnemius, and foot pain. In a prescription also dated March 3, 2016, Dr. Le reiterated his prior diagnoses of plantar fibromatosis, pain, and tendinitis. He ordered a custom molded orthotic for appellant.

By letter and in an appeal request form, dated April 15, 2016, received on April 26, 2016, appellant requested reconsideration of the February 9, 2016 decision. She asserted that she suffered from daily right foot pain and swelling. Appellant noted that she could not wear two-inch heels and that she had to work in tennis shoes that were one-half size bigger in order to have space to wrap her toes together.

² A.M.A., *Guides* (6th ed. 2009).

Appellant also submitted a December 9, 2014 right foot x-ray report from Dr. William Gregoire, a Board-certified radiologist, who provided an impression of comminuted fractures of the first and second toe.

In a right foot x-ray report dated March 3, 2016, Dr. Le noted an increase/change in normal soft tissue contour and mild increase in soft tissue density to soft tissue mass to dorsal aspect of the right first digit. He further noted that there was no bone involvement, bony erosions, change in bone density, lytic lesions, or periosteal reaction. There was calcaneal inclination angle decrease, flexible flat foot structure, arthritic changes, and hammertoe deformities. In a March 3, 2016 prescription, Dr. Le ordered naproxen. On May 4, 2016 he described examination findings and reiterated his prior diagnoses of right plantar fascial fibromatosis, foot pain, edema of the lower extremity, and equinus gastrocnemius.

Appellant submitted a patient questionnaire dated March 3, 2016 in which she noted her medical history. She also submitted two photographs of her toes and a compact disc (CD) of diagnostic films.

In a decision dated May 18, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that the evidence submitted was irrelevant or immaterial.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁴ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

Appellant disagreed with OWCP's denial of her schedule award claim. She requested reconsideration and asserted that she continued to suffer from residuals of her accepted right foot conditions. The underlying issue in this case is whether appellant established that she had

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(a).

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

measurable permanent impairment due to the accepted condition of closed fracture of one or more phalanges of the right foot. That is a medical issue which must be addressed by relevant, new medical evidence.⁷

In her April 15, 2016 request for reconsideration, appellant contended that she suffered from daily right foot pain and swelling and had to wear tennis shoes at work that were one-half size bigger in order to have space to wrap her toes. She did not identify a specific point of law that was erroneously applied or interpreted in OWCP's denial of her claim or advance a relevant legal argument not previously considered. Rather, appellant's request generally addressed residuals of the accepted condition and her work limitation, but did not identify or show any error in OWCP's denial of a schedule award. The Board finds that appellant's assertion on reconsideration does not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.

The Board also finds that appellant failed to submit any relevant and pertinent new evidence on reconsideration. The reports from Drs. Hall, Le, and Gregoire addressed appellant's right foot conditions and medication, but did not offer a medical opinion addressing whether she sustained any permanent impairment due to the accepted December 8, 2014 employment injury. None of the physicians provided an appropriate impairment rating under the sixth edition of the A.M.A., *Guides*. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.⁸

Likewise, appellant's March 3, 2016 patient questionnaire, the photographs of her toes, and the CD of diagnostic films are not relevant to the grounds upon which OWCP denied her schedule award claim and insufficient to require a merit review. This evidence does not provide a medical opinion addressing whether appellant has any employment-related permanent impairment under the A.M.A., *Guides*.⁹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant contends that the medical evidence of record proves the extent of her work-related injury. As indicated above, the Board does not have jurisdiction over the merits of the claim. The issue was whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), and the Board has found that OWCP properly denied merit review in this case.

Appellant may request a schedule award or increased schedule award, at any time, based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁸ See *K.T.*, Docket No. 15-1916 (issued February 1, 2016).

⁹ *Id.*

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board